AB Latef & Associates (M) Sdn Bhd v Govindasamy a/l Suppiah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–30–01 OF 2014
MOHD HISHAMUDIN YUNUS, UMI KALTHUM AND IDRUS HARUN JJCA
30 SEPTEMBER 2015

Contract — Oral agreement — Existence of oral agreement — Appellant's director and respondent agreed orally for purchase of property from owner — Respondent made payment for purchase of property — Appellant's director transferred property to appellant — Appellant alleged parties agreed that proceed of sale of property to be divided equally between parties — Respondent alleged appellant's director merely acted as respondent's broker — Which contentions were correct, whether appellant's allegation that parties agreed that proceed of sale of property to be divided equally between parties or respondent's allegation that appellant's director merely acted as respondent's broker — Whether oral agreement existed

Evidence — Adverse inference — Failure to call material witness — Appellant's director made payment to respondent — Respondent alleged payment made for loan granted by individual third party — Respondent failed to call third party as witness — Whether adverse inference could be invoked — Evidence Act 1950 s 114(g)

Evidence — Documentary evidence — Whether judge giving sufficient weight to contemporaneous documentary evidence

The appellant's director ('DW1'), as alleged by the respondent, had made representation to the respondent that he could deal and arrange for all owners of a parcel known as Lot 359 situated at Daerah Barat Daya, Pulau Pinang ('the property') to sell their undivided shares therein to the respondent at RM3.50 per square foot. Relying on the representation, the respondent agreed to purchase the undivided shares in the land and had paid a total sum of RM310,000 to DW1 for that purpose. As events unfolded, the respondent found that DW1, allegedly in breach of the agreement, had transferred the said property to the appellant. Consequently, the respondent commenced an action for a declaration that he was the beneficial owner of the said property and that, for the said property to be transferred to the respondent. The learned trial judge allowed the respondent's claim, hence this appeal. The appellant contended

that the purpose of the purchase was a joint venture between DW1 and the respondent whereby the said property would, after the purchase be transferred to the appellant and ultimately be sold, with the net proceeds from the sale thereof to be divided equally between DW1 and the respondent. The respondent submitted otherwise stating that DW1 merely acted as a broker who would deal and arrange for the purchase of the said property and transfer it to the respondent. The core issue for determination was which of the two contentions could be accepted as correct. There were also ancillary issues for consideration which related to firstly the payment of RM145,000 in respect of which DW1 alleged he had made to the respondent and secondly whether Majlis Agama Islam Pulau Pinang's ('MAIP') undivided share in the land could be sold to a non-muslim. With regard to the first ancillary issue, the respondent pleaded that the payments were for a loan which he had obtained from one Paramaseevan through DW1 which loan he had settled together with interest.

Held, setting aside the High Court's order and allowing the appeal with costs of RM25,000 here and below:

(1) In this case, the parties testified to events that took place 13 years before the commencement of the present suit, whilst the contemporaneous documents spoke of matters existing at the time such documents were issued or used and accordingly the contemporaneity of the documents to the event in question that was, the purchase of the said property, would make it more reliable evidence or could lend credence to the oral testimony of witnesses (see para 14).

(2) The letter from the respondent's solicitor relating to the acquisition of the property, ('exh P6') was a clear and untroverted evidence which supported the appellant's oral testimony that he would share equally the net proceeds from the sale of the said property with the respondent. When exh P6 stated clearly and unequivocally about the mutual agreement that DW1 and the respondent were entitled to equal share of the net proceeds from the sale of the said property, the reasonable and logical inference that could be drawn from such contemporaneous document was that there was actually such agreement between the respondent and appellant. The respondent's evidence that he appointed the appellant as his broker therefore could not be true and must be rejected. The court satisfied that the appellant's version on the preponderance of probabilities, should be accepted (see paras 20 & 29).

(3) Pursuant to O 18 r 7(1) of the Rules of Court 2012, every pleading shall contain and contain only material facts as the parties could not adduce evidence in support of unpleaded facts at the trial. In the absence of any pleading on the factual allegation that DW1 was a broker, the court was not entitled to decide on this issue. Accordingly, the present appeal must

be confined to pleaded facts. The court dismissed this unpleaded fact as the respondent's mere afterthoughts (see para 24).

(4) The learned judge had omitted to consider relevant evidence before the court and even if His Lordship did consider such evidence, he had clearly erred in coming to a perverse conclusion which was against the weight of evidence. An erroneous finding resulting directly from an omission on the part of the learned judge to consider relevant materials before him provides strong justification for the court to reverse such finding (see para 26).

(5) The respondent could not provide any proof that the sum of RM145,000 was indeed from the alleged loan transaction. The person who could confirm about the loan was Paramaseevan himself. However the respondent failed to call Paramaseevan, who was essential to the unfolding of the narrative upon which the respondent's case was based as far as this issue was concerned, to testify. Such failure would attract the invocation of the presumption of adverse inference under s 114(g) of the Evidence Act 1950 against him (see para 30).

(6) The evidence gleaned from Rosli bin Mat's ('DW2') oral testimony, an officer from MAIP, revealed that though there was no statutory prohibition that its immovable property could not be sold to a non-Muslim, it was MAIP's policy that it would not sell its immovable property to a non-Muslim. This evidence lent support to the appellant's case that due to MAIP's policy both the respondent and DW1 agreed to transfer the said property to the latter (see para 31).

[Bahasa Malaysia summary

Pengarah perayu ('DW1'), seperti yang didakwa oleh responden, telah membuat representasi kepada responden bahawa dia boleh mengurus dan mengatur untuk semua pemilik petak yang dikenali sebagai Lot 359 yang terletak di Daerah Barat Dayam Pulau Pinang ('hartanah tersebut') untuk menjual saham mereka yang tidak dibahagikan kepada responden pada RM3.50 sekaki persegi. Berdasarkan representasi itu, responden telah bersetuju untuk membeli saham yang tidak dibahagikan dalam tanah tersebut dan telah membayar jumlah keseluruhan RM310,000 kepada DW1 bagi tujuan tersebut. Berdasarkan kejadian-kejadian tersebut, responden mendapati bahawa DW1, telah dikatakan melanggar perjanjian, telah memindah milik hartanah tersebut kepada perayu. Akibat itu, responden telah memulakan tindakan untuk satu deklarasi yang dia adalah pemilik benefisial hartanah tersebut dan agar, hartanah tersebut dipindah milik kepada responden. Hakim perbicaraan yang bijaksana telah membenarkan tuntutan responden, justeru rayuan ini. Perayu telah berhujah bahawa tujuan belian adalah satu usahasama antara DW1 dan responden di mana hartanah tersebut akan, selepas belian dipindah milik kepada perayu dan akhirnya dijual, dengan hasil bersih

daripada jualan dibahagikan sama rata antara DW1 dan responden. Responden telah berhujah sebaliknya yang menyatakan bahawa DW1 hanya bertindak sebagai broker yang akan mengurus dan mengatur untuk belian hartanah tersebut dan memindah miliknya kepada responden. Terdapat juga isu-isu sampingan untuk dipertimbangkan yang berkaitan pertama dengan bayaran RM145,000 yang mana DW1 mengatakan telah dibuat olehnya kepada responden dan kedua sama ada saham tidak dibahagikan Majlis Agama Islam Pulau Pinang ('MAIP') dalam tanah tersebut boleh dijual semula kepada seorang bukan Muslim. Berhubung isu sampingan pertama, responden mempli bahawa bayaran tersebut adalah untuk pinjaman yang telah diperolehinya daripada Paramaseevan melalui DW1 yang mana pinjaman itu telah diselesaikan bersama dengan faedah.

Diputuskan, mengetepikan perintah Mahkamah Tinggi dan membenarkan rayuan dengan kos RM25,000 di sini dan di bawah:

(1) Dalam kes ini, pihak-pihak memberi keterangan tentang kejadian-kejadian yang telah berlaku 13 tahun sebelum permulaan guaman ini, manakala dokumen-dokumen semasa yang menyatakan tentang perkara-perkara yang wujud pada masa dokumen-dokumen tersebut dikeluarkan atau digunakan dan sewajarnya kekinian dokumen-dokumen itu dengan kejadian yang dipersoalkan iaitu, jualan hartanah tersebut, boleh menjadi keterangan yang lebih dipercayai atau boleh memberi kebolehpercayaan kepada keterangan lisan saksi-saksi (lihat perenggan 14).

(2) Surat daripada peguamcara responden berkaitan pengambilalihan hartanah tersebut ('eksh P6') adalah keterangan yang jelas dan nyata yang menyokong keterangan lisan perayu bahawa dia akan berkongsi sama rata hasil bersih daripada jualan hartanah tersebut dengan responden. Apabila eksh P6 menyatakan dengan jelas dan tanpa ragu-ragu tentang persetujuan bersama bahawa DW1 dan responden berhak kepada bahagian yang sama rata hasil bersih daripada jualan hartanah tersebut, inferens yang munasabah dan logik yang boleh dibuat daripada dokumen-dokumen semasa adalah bahawa memang terdapat persetujuan sedemikian antara responden dan perayu. Keterangan responden bahawa dia telah melantik perayu sebagai brokernya dengan itu tidak mungkin benar dan hendaklah ditolak. Mahkamah berpuas hati yang versi perayu berhubung kebarangkalian yang banyak, hendaklah diterima (lihat perenggan 20 & 29).

(3) Menurut A 18 k 7(1) Kaedah-Kaedah Mahkamah 2012, setiap pliding hendaklah mengandungi dan hanya mengandungi fakta material kerana pihak-pihak tidak boleh mengemukakan keterangan bagi menyokong fakta yang tidak dipli semasa perbicaraan. Dalam ketiadaan apa-apa pliding tentang pengataan faktual bahawa DW1 ialah seorang broker,

mahkamah tidak berhak memutuskan isu ini. Oleh demikian, rayuan ini harus terbatas kepada fakta-fakta yang diplikan. Mahkamah menolak fakta yang tidak diplikan ini sebagai hanya suatu yang telah difikirkan kemudian oleh responden (lihat perenggan 24).

(4) Hakim yang bijaksana telah tertinggal untuk mempertimbangkan keterangan yang relevan di hadapan mahkamah dan jikapun Yang Arif telah mempertimbangkan keterangan sedemikian, beliau jelas terkhilaf dalam membuat kesimpulan yang sesat ini yang bertentangan dengan beban keterangan. Penemuan yang salah diakibatkan secara langsung daripada satu peninggalan di pihak hakim yang bijkasana untuk mempertimbangkan bahan-bahan relevan di hadapannya memberikan justifikasi yang kukuh untuk mahkamah ini mengakas penemuan sedemikian (lihat perenggan 26).

(5) Responden tidak dapat mengemukakan apa-apa bukti bahawa jumlah RM145,000 sememangnya daripada transaksi pinjaman yang dikatakan itu. Orang yang boleh mengesahkan tentang pinjaman itu adalah Paramaseevan sendiri. Walau bagaimanapun responden telah gagal untuk memanggil Paramaseevan, yang penting dalam mengupas naratif yang mana kes responden adalah berdasarkan setakat mana isu ini adalah berkaitan, untuk dibicarakan. Kegagalan sedemikian menarik andaian inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadapnya (lihat perenggan 30).

(6) Keterangan yang datang daripada keterangan lisan Rosli bin Mat ('DW2'), seorang pegawai daripada MAIP, menunjukkan bahawa meskipun tiada larangan statutori bahawa hartanah tak alihnya tidak boleh dijual kepada seorang yang bukan Muslim, ia adalah polisi MAIP bahawa ia tidak akan menjual hartanah tak alihnya kepada seorang bukan Muslim. Keterangan ini menyokong kes perayu bahawa akibat daripada polisi MAIP kedua-dua responden dan DW1 bersetuju untuk memindah milik hartanah tersebut kepada DW1 (lihat perenggan 31).]

Notes

For a case on whether judge giving sufficient weight to contemporaneous documentary evidence, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 1699.

For cases on existence of oral agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6249–6255.

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 430–456.

Cases referred to

Armagas Ltd v Mundogas SA; The Ocean Frost [1985] 1 Lloyd's Rep 1, CA (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Borneo Co (M) Sdn Bhd v Penang Port Commission [1975] 2 MLJ 204; [1975] 1 MLRA 510, FC (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 AMR 4062, CA (refd)
Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals [2000] 3 MLJ 328, CA (refd)
Omega Securities Sdn Bhd v LT Gen (B) Tan Sri Mohamed bin Ngah Said [2012] 6 MLJ 587; [2012] 5 MLRA 593, CA (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564, HC (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 MLRA 183, SC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Evidence Act 1950 s 114, 114(g)
Rules of Court 2012 O 18 r 7(1)

Appeal from: Civil Suit No 22–142 of 2010 (High Court, Pulau Pinang)

K Kumarathiraviam (Lee Hean Cheng & Co) for the appellant.
Malkit Singh (Malkit Singh Randhawa Baidura & Co) for the respondent.

Idrus Harun JCA:

[1] One Abdul Jamil bin Mutalib ('DW1') was a director and majority shareholder in Ab Latef & Assoc (M) Sdn Bhd ('the appellant') whose instructions, his youngest son Latef bin Abdul Jamil, who owned the remaining shares in, but did not have control or power over, the appellant, was accustomed to follow. DW1 it was said, was indeed the alter ego of the appellant.

[2] We glean from the respondent's pleading that in or around the year 2005, DW1 told the respondent that he could deal with and arrange for all owners of a parcel of land measuring approximately 136,000 sqft known as Lot 359, situate at Mukim 12, Daerah Barat Daya, Pulau Pinang held under Geran Mukim 844 ('the land') to sell their undivided shares therein to the respondent at RM3.50 per sqft.

[3] The respondent in consequence of that representation agreed to purchase the undivided shares in the land at that price and it was agreed that the said undivided shares would be transferred to the respondent. The respondent subsequently appointed DW1 as his broker and paid in various stages in that behalf the total sum of RM310,000 to the latter.

[4] DW1 negotiated with the owners of the land which resulted in due course in some of them agreeing to sell their 337,693/898,560 undivided shares ('the said property') at RM3.50 per sqft. However nothing turned out the way the respondent expected when DW1, allegedly in breach of the agreement, transferred the said property to the appellant. The said property is the subject matter of the dispute between both parties in this appeal.

[5] The respondent, therefore, commenced an action by a writ of summons against the appellant seeking the following reliefs:

(a) a declaration that the respondent is the beneficial owner of the said property;

(b) a declaration that the appellant holds the said property as a 'bare trustee' for the respondent;

(c) an order that the appellant transfers the said property to the respondent;

(d) an order that the appellant provides a detailed account of the sum of RM310,000 the appellant had received from the respondent and all expenses incurred by the appellant in connection with the purchase of the said property;

(e) costs and interest; and

(f) other orders or reliefs which the court deems just and expedient.

[6] The appellant, in its defence denied that DW1 told the respondent that all owners of the land wanted to sell their undivided shares in the land at RM3.50 per sqft. Instead, DW1 agreed to deal only with the owners who had agreed to sell their undivided shares in the land at the price of RM3.50 per sqft subject to the oral agreement between the respondent and DW1 as follows:

(a) DW1 would identify the owners of the portions of the land, negotiate with them and handle the purchase of their portions at the price of RM3.50 per sqft;

(b) the respondent would pay for the purchase of the land and other disbursements in connection with the purchase;

(c) the portions purchased would be registered in the name of the appellant;

(d) the respondent appointed DW1 as an agent to appoint at his discretion a solicitor to handle the purchase and to take action against any party;

(e) Messrs Rajendran & Co was appointed as a solicitor with the consent and knowledge of the respondent to handle purchase documents, transfer of ownership of the land, to file an action in connection with one Chinese temple, two illegal factories and four squatter houses on the land in order to obtain vacant possession thereof; and

(f) after the transaction was completed and vacant possession delivered, the land would be sold by the appellant and the net proceeds from the sale thereof would be shared equally between the respondent and DW1 after deducting all costs including any money advanced by DW1.

[7] As regards the alleged payment of RM310,000 by the respondent, the appellant had admitted receiving the payment from the respondent but disputed the amount. The appellant however, while denying the respondent's claim that the said property must be registered in the latter's name, pleaded that the respondent had requested the appellant to register the same in the latter's name because:

(a) the respondent did not want the Inland Revenue Board to investigate his income;

(b) the land owners were more comfortable to sell their property to Muslims or a company owned by a Muslim; and

(c) one of the owners namely Majlis Agama Islam Pulau Pinang ('MAIP') would sell its undivided share in the land to the appellant as it was a Muslim company.

[8] The appellant had additionally pleaded that the said property was registered in the appellant's name using the respondent's and DW1's money based on the agreement between them. Further, it was also the appellant's defence that DW1 had returned RM145,000 out of the sum of RM310,000 to the respondent in the following manner:

(a) RM100,000 by a telegraphic transfer on 8 June 2006 from Public Bank Bhd into the respondent's account No 836156517610 at Standard Chartered Bank, Port Dickson; and

(b) RM45,000 by a cash deposit on 9 June 2006 into the respondent's account No 836156517610 at Standard Chartered Bank, Port Dickson.

[9] Lastly, the appellant alleged that there was an element of cheating in the transaction between DW1 and the respondent in order to defraud MAIP and/or the Inland Revenue Board and accordingly the transaction was unlawful and unenforceable in law.

[10] Following a full trial, on 27 November 2013 the learned trial judge allowed the respondent's claims declaring that the respondent was the beneficial owner of the said property holding the same as a bare trustee. The learned judge had also ordered the appellant to transfer the said property to the respondent and to provide a detailed account of the sum of RM310,000 as well as all expenses incurred by the appellant in connection with the purchase of the said property.

[11] The appellant appeals against the decision of the learned judge. The appeal brings to a focus the contentions before this court, which are confined exclusively to the purpose of the purchase which learned counsel on behalf of the appellant submitted that it was a joint venture between DW1 and the respondent whereby the said property would, after the purchase be transferred to the appellant and ultimately be sold, with the net proceeds from the sale thereof to be divided equally between them, while learned counsel for the respondent on the other hand, contended otherwise stating that DW1 merely acted as a broker who would deal and arrange for the purchase of the said property and transfer it to the respondent. It thus becomes apparent that there are two conflicting versions presented by both parties before us for our decision. In our view, this appeal turns upon a pure question of fact which inevitably requires us to decide which of the two contentions, after considering the evidence adduced by both the respondent and the appellant, can be accepted as correct. This, in our view, is the only core issue for our determination in the appeal before us. There are two ancillary issues which in our view would, upon determination of the core issue, become relevant. These issues relate firstly to the payment of RM145,000 in respect of which DW1 alleged he had made to the respondent and secondly whether MAIP's undivided share in the land could be sold to a non-Muslim.

[12] During the trial in the court below, only the respondent testified on his behalf. The appellant called two witnesses namely DW1 and Rosli bin Mat ('DW2').

[13] Having considered the evidence in its entirety, it is manifest that while the respondent insisted that DW1 was only his broker who was entitled to a brokerage fee or commission and that the said property should be transferred to him, DW1 on the contrary vehemently denied that he was such a person. It was in evidence that the purchase of the said property was a joint venture between the respondent and DW1. When the said property could subsequently be sold, both of them would be entitled to equal shares of the net proceeds from the sale of the same. The evidence led by the appellant also revealed that there were approximately 36 registered owners of the land including MAIP. According to DW1, as MAIP would not sell its undivided share to a person who was not a Muslim, it was agreed between the appellant and the respondent that the

acquisition of the said property would be made in the appellant's name which was a Muslim company.

[14] We wish to express our understanding of the law in the event the court is presented with conflicting evidence by parties in the course of a trial. It is, we apprehend, a duty incumbent upon the court, that where it faces such a situation, to undertake a critical evaluation of the sworn evidence which it has admitted including contemporaneous documentary evidence presented before it. Needless to say, the court should not ignore the significance of the probative value of documents existing, issued or used as the case may be, during the occurrence of an event as witnesses testify to events that occurred several years ago. In this case, the parties testified to events that took place 13 years before the commencement of this suit, whilst the contemporaneous documents speak of matters existing at the time such documents were issued or used and accordingly the contemporaneity of the documents to the event in question that is, the purchase of the said property, would make it more reliable evidence or could lend credence to the oral testimony of witnesses. The relevancy and reliability of contemporaneous evidence without doubt holds true and can be of great assistance to a judge in ascertaining the truth of the matter. The relevant excerpts from the judgment of Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 clearly postulated the legal position as follows:

> For myself, I would with respect feel somewhat safer to refer to and rely on the facts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particulary if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[15] Wan Hamzah SCJ in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 quoted with approval the observation made in the case of *Armagas Ltd v Mundogas SA; The Ocean Frost* [1985] 1 Lloyd's Rep 1 which read:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witness' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[16] The principle was further amplified in the case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 AMR 4062 when the Court of Appeal in elaborating on the duty of the court in this regard held:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate comtemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance, the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the comtemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the comtemporaneous documents. He should, after accepting the respondents' evidence, weigh it against the comtemporaneous documents and evaluate whether such documents support the respondents' oral testimony. We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the comtemporaneous documents speak of matters then existing at the time such documents were issued.

[17] Having stated the law, before this court, we were pressed with the argument urged for the appellant that the appellant's version that the acquisition of the said property in the name of the appellant was consequent upon the joint venture agreed upon orally by both DW1 and the respondent was more probable and should therefore be accepted. This reasoning as we understand it, is premised on the appellant's contention that DW1 is a credible witness, his evidence is coherent and wholly unshaken during cross-examination and in sync with contemporaneous documentary evidence presented before the High Court. Mindful of the principle laid down in the case authorities discussed above, we need only say that judicial reception of oral evidence requires us to look for other evidence, including contemporaneous documents and direct our mind as to the veracity of such oral evidence as against the probative effect of such other evidence and documents. Thus, as regards this appeal, if such evidence is before us, this will certainly call for DW1's oral evidence which was admitted during the trial in the court below to be critically tested against the other evidence or contemporaneous documents in order to ascertain the truth of DW1's oral testimony.

[18] To this end, we sifted through the evidence and found that the respondent, in the course of cross-examination claimed that he came to know about the purchase of the property being made in the name of the appellant on 6 March 2008. On 8 April 2009, a meeting between the respondent and DW1 was held at the office of the appellant's solicitor Messrs Rajendran & Co to discuss the matter. On 10 April 2009 the respondent's solicitor Messrs R Shan & Assoc wrote to DW1's solicitor confirming about the meeting and pertinent issues discussed at the said meeting. This letter was produced at the trial by the respondent and admitted in evidence as exh P6. In fact, in his witness statement the respondent confirmed that exh P6 was the letter from his solicitor at the material time relating to the acquisition of the property. Its contemporaneity therefore was never in question. We accordingly have no

hesitation in accepting exh P6 as the document involving both parties written at the relevant time in relation to the purchase of the said property.

[19] Moving on, upon a perusal of exh P6, it plainly showed that the same had amply corroborated the appellant's oral testimony. This was because the last paragraph of exh P6 had confirmed conclusively the appellant's averment which he never resiled, that any net proceeds from the subsequent sale of the said property would be shared equally between the respondent and DW1. The relevant paragraph of exh P6 is reproduced below:

> AND FINALLY, our mutual clients have agreed that in the event that the said undivided share can be sold at RM55.00 per sqft, they shall be entitled to equal shares of the net proceeds from the said sale [less strict proof of expenditure including legal fees paid in accordance with the SRO].

It is to be observed that DW1's solicitor in reply to exh P6 shortly thereafter vide a letter dated 17 April 2006 (exh P7) confirmed that DW1 agreed to share equally the net proceeds from the sale of the said property. The arrangement had become more conspicuous and conclusive when the reply by the respondent's solicitor in exh P8 on 21 April 2009 did not dispute the confirmation and agreement by DW1 in exh P7 regarding the sharing of the net proceeds of the sale of the said property.

[20] This therefore begs the question whether DW1 was merely acting as a broker who was entitled to a commission as alleged by the respondent in his witness statement and during cross-examination. The relevant part of exh P6 reproduced in the preceding paragraph clearly evinced a diametrically opposed version in the respondent's case itself. On the one hand, the respondent's oral testimony clearly showed, firstly, his denial as regards the agreement for the transfer of the said property to the appellant and the sharing of the net proceeds from the subsequent sale thereof with DW1, and secondly, that on the contrary, the appellant was his broker and the said property would instead be transferred to him. On the other hand, exh P6 reveals the mutual agreement by both the respondent and DW1 to sell the said property and share the proceeds from such sale. Without doubt, exh P6 was a clear and untroverted evidence which supported the appellant's oral testimony that he would share equally the net proceeds from the sale of the said property with the respondent. The production of this contemporaneous document at the instance of the respondent had proven to be detrimental to his case. The line of defence taken by the respondent ended in complete shambles with the production of exh P6. In our judgment, when exh P6 stated clearly and unequivocally about the mutual agreement that DW1 and the respondent were entitled to equal share of the net proceeds from the sale of the said property, the reasonable and logical inference that could be drawn from such contemporaneous document was that there was actually such agreement between the respondent and appellant. We

could not think of any other logical and sensible reason why such mutual agreement would be explicitly stated in the said exhibit if it was non-existent especially when the respondent could make a hefty profit from the sale of the said property at RM55per sqft. The respondent's evidence that he appointed the appellant as his broker therefore could not be true and must be rejected.

[21] The respondent was cross-examined by learned counsel for the appellant on exh P6. The said exhibit as we have just stated in the preceding paragraph was undoubtedly damaging to the respondent's case. It was small wonder that when the respondent was confronted with exh P6, he was completely stumped by the cross-examination and took the easy way out, having apparently realised that exh P6 had seriously contradicted his oral testimony, by denying any knowledge about it and its contents. However, by doing so, the respondent had unrealisingly caused further contradictions and this time, it was between his oral testimony and his witness statement wherein the respondent agreed that exh P6 was in relation to the purchase of the said property, a clear proof that he had knowledge about the exhibit and its contents thus negating his oral testimony that he had no knowledge about exh P6. This irreconcilable difference, considered in light of exh P6 and DW1's testimony, had indubitably cast serious doubt on his credibility as a witness.

[22] It should be noted that the respondent, while agreeing during cross-examination that DW1's action in transferring the said property to the appellant amounted to cheating and criminal breach of trust, the respondent however in the same breath had also admitted that he did not lodge any police report against DW1. The respondent had further claimed that he discovered that the property had been transferred to the appellant on 6 March 2008. Yet, he only discussed with the appellant about the purchase on 8 April 2009 and lodged a private caveat against the land on 29 April 2009 which was over one year after the alleged discovery. It would seem obvious that his conduct in this connection was not the conduct of a reasonable person who would, as a natural reaction, act immediately after or as soon as he had discovered about the transfer in order to protect his interests. The conduct of the respondent in this regard had made his evidence incredulous and an affront to logic. It was manifestly clear that the learned judge had erred when His Lordship completely failed to consider or direct his mind to this evidence.

[23] For four years since the purchase of the said property in 2005–2009, the respondent remained complacent with no sense of foreboding or suspicion and did not enquire with DW1 regarding the said purchase in particular with respect to the transfer of title of the said property to him. It would be recalled that the respondent had advanced his money for the purchase of the said property and in the normal course of event Messrs Rajendran & Co would surely have called him to sign the sale and purchase agreement and the transfer

of title form if indeed the agreement between the respondent and DW1 was for the property to be transferred to him. However the respondent never enquired with the firm about the status of the purchase. It would be unbelievable, or unthinkable to say the least, that the respondent waited for four years without making any enquiry or complaint. His conduct in our view was not consistent with the respondent's case that DW1 acted as his broker and the said property would be transferred to him, instead, it would be more logical to infer that such conduct evinced the real truth that he agreed for the property to be transferred to the appellant and to share equally the net proceeds after the subsequent sale of the said property. It is also appropriate to mention at this juncture that the learned judge, touching on the delay of four years to discuss about the purchase of the said property with the appellant in April 2009, found that the respondent had explained about the delay. We find however that in actual fact, no such explanation was given by the respondent regarding the delay.

[24] As earlier mentioned, in his witness statement and during cross-examination, the respondent said that DW1 was his broker who was entitled to a brokerage fee or commission. However, the respondent admitted that he did not discuss about the brokerage fee or commission with DW1. Despite leading evidence on this fact, we find that the respondent did not plead the same in his statement of claim. This is a material fact that, in our view, would be certain to decide the fate of the respondent's claim against the appellant or otherwise demolish the appellant's defence against the respondent. A material fact on which the party pleading relies for his claim must be pleaded. It is clear from the authorities and indeed a mandatory statutory requirement under O 18 r 7(1) of the Rules of Court 2012 that every pleading shall contain and contain only material facts as the parties cannot adduce evidence in support of unpleaded facts at the trial. The court was not entitled to decide a suit on a matter which was not pleaded. The trial of the suit was confined to pleadings and parties were bound by their own pleadings (see *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; *Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals* [2000] 3 MLJ 328; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 and *Malaysian Court Practice*, 2007 Desk Edition, Lexis Nexis). In the absence of any pleading on the factual allegation that DW1 was a broker, the court was not entitled to decide on this issue. Accordingly, this appeal must be confined to pleaded facts. We dismiss this unpleaded fact as the respondent's mere afterthoughts.

[25] The learned trial judge in allowing the respondent's claim discredited the appellant's evidence and rejected it as an afterthought adding that it was unsupported by contemporaneous documentary evidence. Naturally what followed with this finding was His Lordship's conclusion that the respondent's

version was more probable and acceptable. The learned judge had also disregarded exh P6 totally which was the relevant contemporaneous evidence. With due respect to the learned trial judge, His Lordship was right when he stated that the issues in this case involved a question of fact affecting the credibility of witnesses. His Lordship had also stated that he had made a critical evaluation of the oral evidence against the contemporaneous documentary evidence. However, with respect, His Lordship's finding that the appellant's oral testimony was not supported by contemporaneous documents was patently ludicrous. Nowhere in his judgment did the learned judge refer to exh P6. Had the learned judge done so and weighed the respondent's testimony after accepting it, against this contemporaneous document, His Lordship could not have found that the respondent's oral testimony was probable as exh P6 evinced the intention of both parties to share the net proceeds from the sale of the said property equally. On the other hand, if the learned judge had weighed the appellant's evidence against exh P6, he would have noticed that DW1's evidence was clearly supported by the said exhibit and accordingly proved the material facts pleaded in the statement of defence. They could not have agreed if there was no agreement to that effect. This lent credence to DW1's evidence that there was the oral agreement in respect of the purchase of the said property with both parties mutually agreeing to the equal sharing of the net proceeds from the subsequent sale of the same.

[26] Further, the learned judge failed to appreciate the fact that it was the respondent's testimony which was not supported by any contemporaneous evidence. exh P6 in fact had completely demolished the respondent's oral evidence that DW1 was merely acting as his broker. Yet, the learned judge found the respondent to be honest and straightforward when he testified during cross-examination. Again with respect to His Lordship, it would seem clear that His Lordship's finding had run counter to the sharp rebuke which His Lordship had made against the respondent during his cross-examination on exh P6 that he should not lie and be greedy, a fact which in our view, showed that he blatantly lied in court which in consequence had left his credibility bruised. In our judgment, the learned judge had omitted to consider relevant evidence before the court and even if His Lordship did consider such evidence, His Lordship had clearly erred in coming to a perverse conclusion which was against the weight of evidence. An erroneous finding resulting directly from an omission on the part of the learned judge to consider relevant materials before him provides strong justification to this court to reverse such finding. The Federal Court's decision in the case of *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] 1 MLRA 183 serves as a useful guide to an appellate court in dealing with a situation where a judge has made a wrong assessment of evidence:

> In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the

damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principle of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge.

[27] Further, in *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2 MLJ 204; [1975] 1 MLRA 510 Lee Hun Hoe (Borneo) CJ delivering the judgment of the Federal Court held:

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise (*Lionel Edward Ltd v SA* 1867 C 191).

[28] In *Omega Securities Sdn Bhd v LT Gen (B) Tan Sri Mohamed bin Ngah Said* [2012] 6 MLJ 587; [2012] 5 MLRA 593 the Court of Appeal dealt with the issue of the failure of the trial judge to judicially appreciate the relevant contemporaneous documentary evidence when it held:

> [11] We find that the learned judge had erred in law and in fact in failing to consider and to judicially appreciate the relevant contemporaneous documentary evidence as set out in para (2) above which established on balance of probabilities that there was a concluded and binding contract between the appellant and the respondent and that the respondent was indebted to the appellant as claimed.
>
> [12] The learned judge had also in our view failed sufficiently or at all to judicially appreciate the oral evidence adduced by PW1 and PW2 which was supported by the abovesaid contemporaneous documents which established that the outstanding sum as claimed by the appellant was due and payable by the respondent.
>
> [13] We also find that in arriving at her finding and conclusion the learned judge has uncritically accepted the testimony of the respondent without properly evaluating and weighing the testimony of the respondent against the respondent's contemporaneous conduct and the contemporaneous documents. More importantly she failed to appreciate judicially that the respondent's testimony consisted of a bare denial which lacked any probative value.

[29] Upon thorough scrutiny of the evidence in its entirety, it is, without question, virtually difficult to accept the respondent's evidence as probable. On the facts of the present case, and after we have critically tested DW1's evidence against the contemporaneous documentary evidence, we are satisfied that the appellant's version on the preponderance of probabilities, should be accepted. We have no hesitation in accepting that in truth, the oral agreement between the appellant and respondent indeed existed wherein both of them mutually

agreed that at the conclusion of the purchase of the said property and upon delivery of vacant possession of the same, it would then be sold by the appellant and any net proceeds from such sale would be shared equally between the respondent and DW1. We find that the learned judge had erred in discrediting the evidence of the appellant and accepting the respondent's evidence wholeheartedly.

[30] We shall next turn to consider the ancillary issues. The learned judge doubted DW1's evidence that he had returned RM145,000 to the respondent out of RM310,000 that the respondent had given him. According to DW1, he only spent part of the sum of RM310,000 to purchase the said property and returned RM145,000 to the respondent in 2006. It was not disputed that DW1 had paid this sum to the respondent in two payments. Exhibits D22 and D23 which are the Public Bank Remittance Application Form and Standard Chartered Deposit Voucher respectively, clearly proved the payments of the said sums to the respondent's account. The respondent did not deny that these two payments were made by DW1. However he pleaded that the payments were in fact for a loan which he had obtained from one Paramaseevan through DW1 which loan he had settled together with interest. Inspite of that, we find that the respondent could not provide any proof that the sum of RM145,000 was indeed from the alleged loan transaction. It was in evidence that Paramaseevan was his neighbour and acquaintance back in his hometown in Port Dickson. The alleged loan repayment to Paramaseevan was made by the respondent in Port Dickson. It is somewhat perplexing though, that, if he could make repayment directly to Paramaseevan why did the respondent have to borrow the money from Paramaseevan who was his neighbour and friend through DW1. The person who could confirm about the loan was Paramaseevan himself. However the respondent we observe, failed to call Paramaseevan, who was essential to the unfolding of the narrative upon which the respondent's case was based as far as this issue was concerned, to testify. Such failure in our opinion, will attract the invocation of the presumption of adverse inference under s 114 illustration (g) of the Evidence Act 1950 against him. Edgar Joseph Jr in *Public Prosecutor v Chee Kon Fatt* [1991] 3 CLJ 2564 at p 2565 referred to the Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 where Lord Roche said:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the prosecution.

[31] There remains the question whether the undivided share in the land which belonged to MAIP could be sold to a person who is not a Muslim. The learned judge found that this fact was not pleaded and accordingly rejected the evidence that the land could not be sold to a non-Muslim as an afterthought. With respect to the learned judge, this finding seems to us to be completely

fallacious. The appellant had pleaded that the respondent requested DW1 to register the land in the name of the appellant so that MAIP would sell its undivided share in the land to the appellant, a company owned by a Muslim. It was in evidence that MAIP would not sell its undivided share in the land to a purchaser who was not a Muslim and it wished to sell its undivided share in the land to the appellant at the price of RM3.50 per sqft. Negotiation had commenced and to this end MAIP had also obtained a valuation for the land. The evidence gleaned from Rosli bin Mat's (DW2) oral testimony, an officer from MAIP, revealed that though there was no statutory prohibition that its immovable property could not be sold to a non-Muslim, it was MAIP's policy that it would not sell its immovable property to a non-Muslim. This evidence in our view lent support to the appellant's case in this regard that due to MAIP's policy both the respondent and DW1 agreed to transfer the said property to the latter. The learned judge's finding that DW1's evidence on this issue was an afterthought, viewed against this evidence in our opinion defied logic. His Lordship had completely disregarded DW2's evidence.

[32] We wish to deal briefly with one aspect of the appellant's defence. It would be remembered that the appellant averred that he requested the appellant to register the said property in the latter's name as he did not want the Inland Revenue Board to investigate his income and that there was an element of cheating to defraud MAIP and Inland Revenue Board. We have perused the evidence including DW1's witness statement thoroughly and are satisfied that the appellant did not adduce any evidence on this aspect of the appellant's defence. Neither was this issue ventilated in learned counsel's submission both oral and written. It would appear therefore that the appellant had abandoned this line of defence. We accordingly disregard this part of the appellant's defence.

[33] The grounds of judgment of the learned judge do not indicate that there was a proper, adequate and correct judicial appreciation of the entire evidence in order to ascertain the truth of the matter despite stating that His Lordship had made a critical evaluation of the evidence. In our judgment, it is appropriate to conclude that, for the reasons which we have alluded to earlier, the learned judge had erred in misapprehending the law and material evidence in allowing the respondent's claim. We are satisfied that the respondent has failed to prove his claim against the appellant and consequently his claim must inevitably fail. Therefore we set aside the High Court's order and allow this appeal with costs of RM25,000 here and below to be paid to the appellant. The security for costs of RM20,000 and the deposit shall be refunded to the appellant.

High Court's order set aside and appeal allowed with costs of RM25,000 here and below.

Reported by Dzulqarnain Ab Fatar